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Procedures Appealing Orders

Issued Under the

OCCUPATIONAL

HEALTH

AND

SAFETY ACT

R.S.O. 1990, c.O.1

Office of Adjudication

June 1993



Ontario

I.

Introduction

Appeals of decisions of inspectors under section 61 of the *Occupational Health and Safety Act* are heard by the Occupational Health and Safety Adjudicator, who is the Chair of the Office of Adjudication, or one of his or her delegates.

Requests made under subsection 61(7) of the *Act* for suspensions of orders until the appeal is dealt with are also heard by an Adjudicator.

The Office of Adjudication is an independent agency funded by the Ministry of Labour; the relationship between the Ministry of Labour and this Office is no different than that of any other party to the appeal proceeding.

Under section 61 of the *Act*, the Adjudicator may substitute his or her findings for those of the inspector who made the decision being appealed. The Adjudicator may also either cancel or approve the order, or make a new order in substitution for the order under appeal.

II Procedure

A. Who May Appeal?

Section 61(1) of the *Act* provides in effect that any employer, constructor, licensee, owner, worker or trade union which feels himself, herself or itself wronged by any order made by an inspector under this *Act* may appeal the order. Section 61(5) extends the definition of "order" to include a decision or the refusal to make an order or decision.

B. When is the Appeal to be Made?

Section 61(1) provides that the appeal is to be made *within fourteen days of the making of the order or decision*. The Office of Adjudication will not "pre-screen" appeals to make sure they have been made on time. However, any party is free to raise "timeliness" when opposing the appeal either at the hearing or in writing before the hearing is held.

C. Starting an Appeal

Subsection 61(2) of the *Act* states that an appeal may be made in writing, orally or by telephone.

Appeals are frequently made to various officials of the Ministry of Labour. Upon receiving appeal requests, the individuals who received the requests are expected to forward them to the Office of Adjudication immediately. While this practice will be allowed to continue, it is the intention of this Office to encourage parties to make their appeals directly in order to permit quicker handling of appeals and to eliminate any doubt about where and when an appeal was made.

This Office therefore encourages all persons wishing to start an appeal ("appellants") to communicate all information necessary for the processing of the appeal to the Office directly. Where an appeal is made orally or by telephone, the Registrar will request that written reasons ("grounds") for the appeal be submitted to the Office. This Office will be able to deal with an appeal most quickly if the appeal is started in writing, and the letter starting the appeal contains a statement of the grounds for the appeal. It is also requested that you provide a copy of the report containing the decision(s) appealed from, the name, address, and telephone number of the inspector who made the decision(s), and the name, address and telephone number of an appropriate worker representative (if the appeal is initiated by an employer) or an appropriate employer representative (if the appeal is initiated by a worker or trade union). An appropriate worker representative will normally be a worker representative on a joint health and safety committee or a certified worker health and safety representative, if one is present. Where a trade union or trade unions represent some or all of the affected workers, the name, address, and telephone number of an appropriate union official should also be included.

Sometimes the Office of Adjudication obtains, from field offices of the Ministry, copies of the written reports containing the decision(s) appealed from together with other information necessary for the processing of an appeal. It is hoped that this Office and the Ministry can continue to cooperate to ensure that the necessary information is received.

D. Parties to the Appeal

Section 61(3) of the *Act* allows the Adjudicator to specify other parties to the appeal besides the appellant and the inspector. Usually, there will be three parties to an appeal: management, workers (often represented by their trade union, if any), and the Ministry of Labour on behalf of the inspector.

E. Resolving the Issues Before the Appeal Hearing

The Office of Adjudication will continue the practice of asking that the Ministry of Labour assign someone to try to mediate a settlement ("mediator"). The Office has no mediators of its own, and can only suggest that the appellant and the Ministry try to reach a settlement before the hearing.

This Office encourages all parties to make every effort to come to an agreement acceptable to all the parties before the appeal is heard.

III. Suspensions of Orders Until the Appeal Is Heard (Section 61(7))

Requests for suspensions of orders or decisions until the appeal is heard should be made in writing wherever possible. The party asking for the suspension should include in their letter ("written submission") to the Office any facts they are relying on for the request, as well as reasons for asking for the suspension. This submission will be circulated to the other parties to the appeal for comment. The procedure is speeded up if copies of the letter are delivered to the other parties at the same time they are delivered to the Office of Adjudication.

In many cases, suspension requests will be dealt with based on the written submissions of the parties. This will not always be possible, however, particularly where critical facts cannot be agreed upon. Where the Adjudicator is of the view that the request cannot be dealt with adequately by written submissions, a hearing may be scheduled on short notice ("expedited hearing") to decide whether the suspension will be granted. It may sometimes be necessary to schedule such a hearing before or after regular working hours.

In cases of extreme urgency, the Office may schedule an expedited hearing of a suspension request without requiring a written submission from the applicant. An example of a situation where such a hearing might take place would be where a "stop work order" has brought a substantial amount of production to a halt and losses are expected to be high even in the short term. These kinds of urgent

situations might call for an exception to the general practice of this Office of scheduling a hearing at a location convenient to the workplace of the parties.

In other cases, the Adjudicator may hear the request by way of a conference telephone call involving representatives of all parties.

IV. Expedited Hearings

On occasion, the Office will schedule an expedited hearing on the appeal itself. This will only be done in cases of genuine urgency (as, for example, where an employer's operation is seriously affected by a stop work order). If a party making an appeal believes that an expedited hearing is appropriate, they should request such a hearing in writing, setting out the reasons why the matter is urgent enough to require a hearing on short notice.

The Adjudicator may decide, on his or her own, to hold an expedited hearing of an appeal. To date, this has happened on occasions where an appeal has been accompanied by a suspension request and the Adjudicator has, on reviewing the file, concluded that since an expedited hearing would be required for the suspension request(s) in any event, and since many of the issues would be the same for the suspension request as for the appeal, it is easier to simply have an expedited hearing on the appeal itself.

Where an expedited hearing is considered necessary by the Adjudicator, this may be another exception to the general practice of scheduling hearings at a location near the affected workplace.

V.

The Appeal Hearing

A. Scheduling the Hearing

The Office of Adjudication tries to set hearing dates convenient to all parties. In a typical appeal, the parties will receive a letter from the Registrar which includes a tentative date, place, and time for the hearing. If a party finds that date inconvenient, it should notify the Office immediately. About three weeks before the date set out in the Registrar's letter, a "Notice of Hearing" will be issued. Once this Notice has been issued, the way to change the date of the hearing is as follows: the party asking for the change of date will be asked to contact all other parties to get them to agree to moving the hearing date ("adjournment on consent"). Only rarely and with good reasons will an adjournment be granted where all the parties have not agreed. Otherwise, the hearing will be scheduled on the date set out in the Notice.

B. Representation

All parties to the appeal have a right to be represented by a lawyer or an agent, but the parties may participate at the hearing without having anyone else represent them.

C. Pre-Hearing Meetings

In certain instances, the Adjudicator may consider it appropriate to arrange for a pre-hearing meeting of all the parties to discuss how the hearing should proceed. If a party to an appeal thinks that their hearing might require a pre-hearing meeting or a conference call, they should request in writing that the Registrar make the appropriate arrangements.

D. The Hearing

In the normal course of an appeal hearing, the appellant will present its case first. Unless the parties are able to agree about the facts of the case, it is expected that evidence will be called through the sworn testimony of witnesses. In other words, all parties have the right to call witnesses to provide details of the facts about the case; every party is given the opportunity to ask questions of every witness (“examination” and “cross-examination”).

Naturally, all parties also have the right to present their case in a kind of summary after all the witnesses have been heard from (“final submissions”).

Hearings are open to the public. Cameras and other recording equipment are not permitted inside the hearing room.

E. Taking a View

In some instances, it may be appropriate for the Adjudicator and the parties to go to a workplace in order to become familiar with the machinery, equipment or work processes important to the appeal. Because “taking a view” is extremely time consuming in terms of a hearing, it is only likely to happen when the Adjudicator feels something about the facts or the workplace cannot easily be fully described in evidence at the hearing.

VI.

The Adjudicator's Decision

The Adjudicator may issue a decision orally immediately following the parties' final submissions. When the Adjudicator does so, written reasons will be issued as soon as practical after the hearing. In most cases, the Adjudicator will reserve judgement and issue a written decision at a later date.

Copies of all decisions of Adjudicators are forwarded to the Ministry of Labour Library, 10th floor, 400 University Avenue, Toronto. The Office of Adjudication also maintains a mailing list of persons who wish to receive copies of all decisions. In the future, there may be a subscription cost for being on the Office's mailing list.

Office of Adjudication
790 Bay Street
Suite 1106
Toronto, Ontario
M5G 1N8

Telephone: (416) 326-6400
Fax: (416) 326-6402

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ISBN 0-7778-1414-5